In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-822

THE SOUTHLAND CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSTION

The National Labor Relations Board in this case found that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158 (a)(3) and (1), by discharging three employees, including Lowell Hart, because of their union activities and by issuing an unfounded warning notice to Hart (Pet. App. 6-A, 7-A, 29-A to 31-A, 38-A to 41-A, 46-A to 48-A). The Board further found that petitioner had violated Section 8(a)(1) of the Act when its plant superintendent warned Hart, prior to his unlawful discharge, that "[i]t is too bad that a nice young man like you would have to get messed up in an organization like you are messed up with [the Union] because you would have had a great future at this plant" (Pet. App. 49-A). Accordingly, the Board ordered the Company, *inter alia,* to cease and desist from the

unfair labor practices found, to offer the discharged employees reinstatement, and to make them whole for any loss of earnings resulting from their discharges (Pet. App. 8-A to 11).

The court of appeals summarily enforced the Board's order (Pet. App. 1-A to 2-A). The principal issue raised by petitioner here (Pet. 7-11, 16-17) is whether the Board was precluded from finding that the plant superintendent's remark to Hart constituted a violation of Section 8(a)(1) of the Act because that remark was not specifically alleged in the complaint.[1] That issue does not warrant further review.

The Administrative Law Judge found that the complaint did encompass the supervisor's remark (Pet. App. 49-A).[2] Moreover, the propriety of that remark was fully

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[1]Petitioner also contends (Pet. 11-15) that the Board's finding of anti-union animus is not supported by substantial evidence. But there is ample evidence of petitioner's "hostility toward * * * unionization" (Pet. App. 30-A). See *e.g.*, Pet. App. 17-A to 19-A.

[2]Paragraph 7 of the complaint alleged (C.A. App. 39-40):

> Since on or about April 13, 1973 and continuing to date, the Respondent has interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by the following acts and conduct:
>
> (a) On or about April 13, 1973, Respondent, by its supervisor and agent, M. W. Hightshoe, at its Owentown, Texas facility, orally warned its employees that they would be discharged if they became or remained members of the Union or gave any assistance or support to it.
>
> (b) On or about April 13, 1973, Respondent, by its supervisor and agent, M. W. Hightshoe, at its Owentown, Texas facility, warned its employees that if they became or remained members of the Union or gave assistance or support to it that strikes would inevitably result and that they would lose their jobs as a consequence.

Paragraph 7(b) of the complaint refers to the supervisor's speech to petitioner's assembled employees, which the Administrative Law Judge found not to violate the Act (see Pet. App. 17-A to 19-A; 48-A to 49-A). There is no reason to assume—as petitioner does (Pet. 9-10)—that Paragraph 7(a) also refers to that speech.

litigated at the hearing before him, where petitioner had a full opportunity to explain, rebut, or deny it.[3] Since the issue was tried at the hearing, the Board properly based a finding on it. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

FEBRUARY 1975.

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[3]Petitioner's contention (Pet. 10) that it had no opportunity to rebut Hart's testimony concerning the remark is not well taken, since it never requested a continuance in order to call the supervisor as a witness or otherwise to rebut the General Counsel's case.